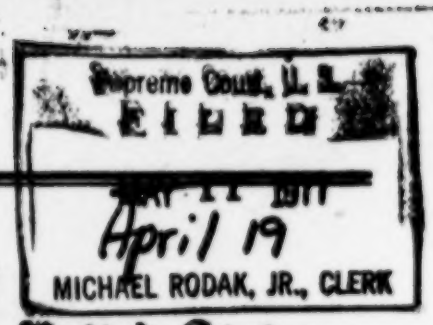

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1458

EAGLE LEASING CORPORATION, OLIN CORPORATION and NILO BARGE LINE, INC.,
Petitioners

versus

HARTFORD FIRE INSURANCE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

George A. Frilot III
Michael A. McGlone
Lemle, Kelleher, Kohlmeyer, & Matthews
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112

Counsel for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

	PAGE NO.
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Allowing the Writ	6
Conclusion	11
Certificate of Service	12
Appendix A - (Opinion of the Court of Appeals)	A-1
Appendix B - (Court of Appeals Denial of Rehearing)	A-17
Appendix C - (Opinion of District Court in Eagle Leasing Corporation, et al. v. The Hartford Fire Insurance Company)	A-19
Appendix D - (Agreed Stipulations of Fact Submitted by Eagle Leasing Corporation, Olin Corporation, Nilo Barge Line, Inc. and Hartford Fire Insurance Company)	A-27

TABLE OF CASES

PAGE NO.

Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185, 22 S.Ct. 47 (1901) 10

Aschenbrenner v. United States F. & Guar. Co., 292 U.S. 80, 54 S.Ct. 590 (1934), rehearing denied 292 U.S. 615, 54 S.Ct. 861 8

First Nat. Bank v. Hartford Fire Ins. Co., 95 U.S. 673, 24 L.Ed 563 (1877) 8

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 44 S.Ct. 90 (1923) 8

Mutual Life Ins. Co. v. McGren, 188 U.S. 291, 23 S.Ct. 375 (1903) 10

Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 48 S.Ct. 512 (1928) 8

Turtle Mountain Band of Chippewa Ind. v. United States, 490 F.2d 935 (Ct. Cl. 1974).. 10

OTHER CITATIONS

Corpus Juris Secundum, Vol. 4A, Section 1206 10

Lazard's Marine Insurance Forms 7

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76 - 1458

EAGLE LEASING CORPORATION, OLIN CORPORATION and NILO BARGE LINE, INC.,
Petitioners

versus

HARTFORD FIRE INSURANCE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Eagle Leasing Corporation, Olin Corporation and Nilo Barge Line, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in No. 74-3858 rendered on October 22, 1976, rehearing denied January 19, 1977, reversing the earlier judgment in favor of petitioners by the United States District Court for the Eastern District of Texas, Beaumont Division, in Civil Action 7279.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 540 F. 2d 1257 and it appears herein at Appendix A, p. A-1; the order of the Fifth Circuit denying the application for rehearing was entered on January 19, 1977 and appears herein at Appendix B, p. A-17 . The decision of the United

States District Court for the Eastern District of Texas, Beaumont Division, rendered on September 21, 1974, reported at 384 F.Supp. 247, appears at Appendix C, p. A-19.

JURISDICTION

The opinion and judgments of the United States Court of Appeals for the Fifth Circuit was entered on October 27, 1976 and the order denying the request for rehearing was entered on January 19, 1977. This petition for certiorari was filed less than ninety days from the aforesaid date of denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. Whether a standard printed form of marine Protection and Indemnity insurance provides continuing coverage to the owner of a vessel which sinks during the currency of the policy as respects liability to third parties claiming damages resulting from a collision with the sunken vessel which occurred after the term of the policy has expired?

2. Whether the United States Fifth Circuit Court of Appeals abused its judicial notice discretion by premising its decision on the following facts which are completely unsupported by the record:

   a) That authorship of the standard printed form of marine Protection and Indemnity insurance was attributable to both the insurers and insureds on an equal basis;

   b) That the insurance contract was confected by petitioner and the insurer with each being advised by competent counsel and informed experts;

   c) That the owner of the sunken vessel might have procured other insurance to cover its third-party liability following cancellation or termination of the marine Protection and Indemnity policy which was in force at the time of the sinking.

STATEMENT OF THE CASE

The dispute had its beginning on November 16, 1968 when Barge NL-701, owned by petitioner, Eagle Leasing Corporation, under bareboat charter to petitioner, Olin Corporation and sub-chartered to petitioner, Nilo Barge Line, Inc., sank in the Gulf of Mexico. After the sinking, Nilo conducted search and salvage operations with the approval of the insurer of the barge, Hartford Fire Insurance Company. Representatives of U. S. Salvage Association were on hand to observe and supervise the salvage operations, again with Hartford's consent and approval. By February 13, 1969, the bow of the barge had been raised to the surface but the stern remained embedded in the mud bottom eleven fathoms below. However, heavy weather aborted the salvage operations, forcing the salvage vessels to return to port and causing the bow of the barge to again sink to the bottom. Unbeknown to Nilo or anyone else connected with the salvage operations, on the evening of February 14, 1969, Sun Oil's tanker WESTERN SUN struck a submerged object in the immediate vicinity of the sunken NL-701. When the heavy weather subsided and the damaged salvage equipment had been repaired, Nilo returned to the sunken barge and discovered that it had broken in two.

The stern section remained embedded in the mud but the bow could not be located. The salvors assumed that the barge had pounded in the heavy weather until it broke in half. The bow section was ultimately located on March 2, 1969, but the severed hulk was of little value and Nilo abandoned further salvage attempts.

The disagreement with Hartford began even before the abandonment of the wreck. The Hartford refused to pay the claim for loss of or damage to the barge. Litigation followed and the claim was ultimately compromised just prior to commencement of trial in the United States District Court at St. Louis, Missouri.

After denying the claim for loss of the barge, Hartford increased its annual premium charge for the coverages afforded petitioners from $251,016.58 to $583,000.00. This action prompted petitioners to place the coverage elsewhere. On January 13, 1969, a commitment was obtained for renewal of the coverages with another underwriter, Marine Office of America-Appleton & Cox, Marine Division. The replacement coverage was handled by an insurance brokerage firm, Lawton-Byrne-Bruner of St. Louis. The new coverage included a schedule of all Nilo *vessels*, but it did not include the *sunken wreck* of the NL-701.

On February 10, 1971, the Sun Oil Company filed suit against petitioners in the United States District Court for the Eastern District of Texas, Beaumont Division, seeking to recover for damage occasioned to the S/S WESTERN SUN which had allegedly struck the sunken Barge NL-701. The defense of the action brought by Sun was tendered to the Hartford, but again Hartford claimed "no coverage". Accordingly, petitioners employed counsel and successfully

defended the case, but costs and expenses were not inconsequential.

Your petitioners then filed suit against Hartford in the United States District Court for the Eastern District of Texas, Beaumont Division, to recover their costs in defending the suit brought by Sun Oil. There was no testimony taken in the case and the record consists solely of a Stipulation of Facts to which certain documents, including the insurance policy, are appended. Appendix D, p. A-27. The District Court held that the policy of P & I insurance issued by the Hartford and in force at the time of the sinking of the Barge NL-701 provided continuing coverage with respect to claims such as that asserted by Sun Oil. The District Court found it unnecessary to resort to the rules of contract construction because the provisions of the policy were unambiguous and clear in their meaning. The holding of the District Court was reversed by the United States Fifth Circuit Court of Appeals which found that "ambiguity prevades these provisions" of the policy of P & I insurance. However, the Appellate Court refused to apply the general rule that ambiguous provisions in an insurance policy are to be construed against the insurer. The departure from this general rule of law was premised upon a belief that its application was impractical inasmuch as one of the petitioners insured under the policy was Olin Corporation, "not an innocent but a corporation of immense size represented by counsel on the same professional level as the counsel for the insurer." The Appellate Court likewise observed that the policy was of the manuscript variety and concluded that drafting of the policy was attributable to the petitioners as well as the insurer. Finally, in discussing the equities of the case, the Appellate Court commented that "as long as the sunken barge could give rise to significant

liability Olin could reasonably be expected to maintain insurance on it."

REASONS FOR ALLOWING THE WRIT

1. PROPER INTERPRETATION OF THIS STANDARD PRINTED FORM OF MARINE PROTECTION AND INDEMNITY POLICY IS IMPORTANT TO THE ENTIRE MARINE INDUSTRY

The opinion of the District Court properly noted that the question presented in this case is one of first impression. Never before has any Court interpreted the language of the protection and indemnity policy as respects whether continuing coverage is afforded the owner of a sunken wreck which constitutes a hazard to navigation or otherwise endangers third parties. May a vessel owner rely on insurance purchased prior to the sinking of his vessel or must he seek additional coverage to afford protection against the risks created by the sinking? The Court of Appeals made an unfounded assumption that additional insurance was available to a vessel owner. However, the cost and availability of such insurance is not a fact disclosed by the record and the Appellate Court's reliance upon the assured's ability to obtain such insurance is misplaced. Enormous risks created by a sunken vessel may continue well beyond the expired term of any insurance coverage in force at the time of a sinking, including so-called "umbrella" coverage. Will a vessel owner be able to purchase insurance after the fact to cover these known hazards? Take for example the problems relating to the sinking of a barge containing a dangerous chlorine cargo. If the sunken barge is located in or near a fairway or shipping lane, the potential for catastrophic disaster is obvious. After the sinking has occurred, would an

underwriter insure such a risk? What if the sinking occurred on the day prior to the expiration of the P & I policy covering the sunken barge; one day later would the barge owner be without coverage for third party liability? What if on the day following the sinking the P & I insurer gave five-day notice of cancellation in accordance with the provisions of P & I Form SP-14? Whether insurance would be available under such circumstances is a matter on which the record is silent.

The United States Fifth Circuit Court of Appeals properly noted that portions of the policy in question are of the "manuscript" variety. The policy is an insurance package which contains four separate sections providing (1) Hull, (2) P & I, (3) Cargo and (4) Charterer's Legal Liability insurance. Various provisions in each section are in typed rather than printed form. However, the clauses to be interpreted in this case are contained solely in a standard printed form of marine insurance, entitled "Protection and Indemnity Clauses - Inland Vessels" and bearing the form number: "SP-14".[1] In the lower left hand corner of the form there is the notation "For sale by Joseph Lazard, 11 John Street, New York, N.Y. 10038", and in the lower right hand corner there is the notation "Printed in the U.S.A." Clearly the SP-14 form, on its face, is a standard form utilized in insuring inland vessels against protection and indemnity risks. For that reason, the interpretation of the language of the form is meaningful not only to the litigants but to the entire marine industry, particularly that segment of the industry which owns and operates inland boats and barges. Among those primarily affected are harbor tug companies, towboat companies, barge lines and many family-owned small boat

1. The SP-14 form, along with other standard marine insurance forms, can be found in *Lazard's Marine Insurance Forms*.

companies. The rule enunciated by the Court of Appeals will subject these parties to unduly and unfairly burdensome insurance problems.

2. THE MAJOR PREMISE UPON WHICH THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS REVERSED THE DISTRICT COURT CONSISTED OF MATTERS NOT CONTAINED IN THE RECORD

The District Court found the P & I policy to be unambiguous in its terms and clear in its meaning, holding that the policy provided coverage under the circumstances of this case. By contrast, the United States Court of Appeals stated, "In our view ambiguity prevades these provisions." Nonetheless, the Court of Appeals refused to apply the general rule, approved by this and other Courts, whereby ambiguous provisions in an insurance policy are construed against the insurer.[2] Justification for avoidance of the general rule of law was premised upon judicial notice by the Court of Appeals that one of the assureds, Olin Corporation, was "a corporation of immense size" carrying in-

---

2. *Aschenbrenner v. United States F. & Guar. Co.*, 292 U.S. 80, 54 S.Ct. 590, 78 L.Ed. 1137 (1934) rehearing denied 292 U.S. 615, 54 S.Ct. 861, 78 L.Ed. 1474;

Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 48 S.Ct. 512, 72 L.Ed. 895 (1928);

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 44 S.Ct. 90, 68 L.Ed. 235 (1923);

First Nat. Bank v. Hartford Fire Ins. Co., 95 U.S. 673, 24 L.Ed. 563 (1877).

surance with annual premiums in six figures. No one would quarrel with the fact that Olin is a large corporation and the record demonstrates that the fleet of vessels insured under the policy in question called for a premium in six figures. However, the Court of Appeals went far beyond the bounds of propriety in reaching other conclusions which either follow from what had been judicially noticed nor are in any way supported by the record.

The Court of Appeals concluded that Olin was "managed by sophisticated business men"; that in the negotiations for the placement of the policy it was "represented by counsel on the same professional level as the counsel for insurers"; that in substance "the authorship of the policy is attributable to both parties alike"; and that counsel for large companies "are acutely aware of the meaning and effect of the language."

None of the foregoing is found in the record. In point of fact the record discloses that the policy was procured for Nilo Barge Line by the Lawton, Bryne & Brunner Insurance Agency of St. Louis, Missouri. The record does not so reflect, but we here state that no one from Nilo, Olin or Eagle Leasing Corporation participated in the procurement of the policy much less the drafting of the policy provisions. On the face of the papers it seems abundantly clear that the P & I insuring clauses, which are on a standard printed form, were not the product of Olin Corporation, Nilo Barge Line or Eagle Leasing Corporation. The fact is that the premise upon which the Court of Appeals departed from the general rule applicable in the construction of insurance contracts is a false premise.

The law is clear that the Appellate Court should not con-

sider anything which is not contained in the record and should decide the case before it and the question raised only on the basis of the record presented.[3] The hornbook rule is well stated as follows:

> "The appellate court can only take the record as it finds it, and cannot add thereto, or go behind, beyond, or outside it; and it will not prosecute an independent inquiry, or indulge in surmise, conjecture, speculation, or assumption as to matters not in the record, or consider matters which lie in the imagination or apprehension of court or counsel. The sole question which such court is required to determine is whether the judgment which is the subject of review is a legitimate conclusion from the premises which the record contains." [4]

If judicial notice was the basis upon which the Court of Appeals reached its false premise, the discretion entrusted to it by Rule 201 of the Federal Rules of Evidence was abused. Certainly the facts relied upon are not within the class defined as "generally known" nor are they "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." They

---

3. *Mutual Life Ins. Co. v. McGren,* 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1903);

Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185, 22 S.Ct. 47, 46 L.Ed. 144 (1901);

Turtle Mountain Bank of Chippewa Ind. v. United States, 490 F.2d 935 (Ct. Cl. 1974);

Corpus Juris Secundum, Vol. 4A, Section 1206.

4. *Corpus Juris Secundum,* Vo. 4A, Section 1206, pp. 1333-4.

are instead surmise and assumption as to matters not in the record. Without an opportunity to disprove these assumptions, your petitioners are left without due process of law and have been discriminated against because one of their number is "a corporation of immense size."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

_____

George A. Frilot, III

CERTIFICATE OF SERVICE

I, George A. Frilot III, one of the attorneys for petitioner in the above-entitled proceeding, being a member of the Supreme Court of the United States, do hereby certify that on the 18th day of April, 1977, I served copies of the Petition for Writ of Certiorari, together with the Appendix attached thereto, by mailing copies thereof in duly addressed envelopes postage prepaid to Brunswick G. Deutsch and Overton T. Harrington, Jr. of Deutsch, Kerrigan & Stiles, 4700 One Shell Square, New Orleans, Louisiana, 70139.

George A. Frilot, III

APPENDIX A

OPINION OF THE COURT OF APPEALS

EAGLE LEASING CORPORATION, Olin Corp. and Nilo Barge Line, Inc.,
Plaintiffs-Appellees

v.

HARTFORD FIRE INS. CO.,
Defendant-Third-Party
Plaintiff-Appellant,

v.

NAT'L CASUALTY CO., etc., et al.,
Third-Party Defendants

No. 74-3858

United States Court of Appeals, Fifth Circuit

Oct. 22, 1976

Overton T. Harrington, Jr., Brunswick G. Deutsch, New Orleans, La., for plaintiff-appellant.

George A. Frilot, III, New Orleans, La., for plaintiffs-appellees.

Appeal from the United States District Court for the Eastern District of Texas.

Before WISDOM, COLEMAN and GEE, Circuit Judges.

WISDOM, Circuit Judge:

This appeal presents an unusual question involving the construction of the Protection and Indemnity (P&I) coverage afforded by a policy of marine indemnity insurance. The Hartford Fire Insurance Company (Hartford) appeals from a district court holding that it must indemnify the insured, Olin Corporation (formerly Olin Mathieson Corporation), and its affiliates, Eagle Leasing Corporation, and Nilo Barge, Inc. (collectively referred to as Olin), for attorneys' fees and expenses incurred in the defense of a suit against Olin by Sun Oil Company. *See* E.D. Tex. 1974, 384 Supp. 247. The fleet policy was issued and delivered to Olin in St. Louis, Missouri, on January 1, 1967, and also included coverage for Hull and Machinery, Cargo, and Charter's Legal Liability. The policy period was three years subject to payment of renewal premiums that were to be recomputed annually on the basis of Olin's loss record.

The renewal premium for 1969 quoted to Olin in December 1968, was $583,000, more than double the rate for 1968. Hartford asserts that this increase was due to extensive fleet losses during 1968. Olin soon notified Hartford that it intended to seek coverage with other insurers. After Hartford had granted two extensions of its existing policy in January 1969, Olin obtained fleet insurance from new insurers. Its policy with Hartford was terminated by mutual consent on January 27, 1969. All premiums accruing through that date were paid.

Before the termination of the Hartford policy, Olin experienced a fleet loss at sea. On November 16, 1968, Barge

NL-701, owned by Eagle Leasing, but under bare-boat charter to Olin and sub-charter to Nilo Barge, sank in the Gulf of Mexico about 50 miles from Galveston, Texas. Search and salvage operations were initiated soon afterwards. The bow of the vessel was raised to the surface by February 13, 1969, but the stern remained embedded in the mud bottom eleven fathoms below. At this point, severe weather caused the salvage operations to cease. During the ensuing storm the barge split into two sections. Further recovery efforts were later conducted, continuing into March 1969, when they became economically unwarranted. Olin then abandoned and sold the sunken wreck of the barge.

About two years later, on February 10, 1971, Sun Oil Company sued Olin for damage to its tanker, the S/S WESTERN SUN, which allegedly had struck Olin's sunken barge on February 14, 1969, Sun Oil 's complaint alleged, in part, that Olin "failed and refused to remove" the barge and that it "failed and refused to light" or to "properly mark" it. Neither Hartford nor Olin had notice of the claim or loss before Sun filed suit. Olin tendered its defense to Hartford under the P & I provisions of its earlier policy with Hartford. The tender was refused on the ground that there was no coverage.[1] Olin retained its own attorneys who tried the collision case on the merits. The district court denied any recovery by Sun Oil in its judgment, entered on January 29, 1973, on the ground that the *Western Sun* had struck an

---

1. According to the pleadings, Sun Oil Company charged failure to mark a wreck, not failure to raise a wreck. The policy does not cover failure to mark a wreck, nor does it cover defense of risks not assumed. Although the court below states that liability was asserted against Olin "on the basis of negligent failure to promptly remove the wreck", in fact Sun's complaint charged Olin with failure to mark the wreck and the Findings and Conclusions of the Court below reflect that this was the claim asserted.

unidentified underwater object, not Olin's barge.[2]

Meanwhile, Olin had commenced this action on June 2, 1971, seeking to establish its right to indemnification for attorneys' fees and expenses for defending the collision suit. The district court tried the case on stipulated facts and briefs. It held that the unambiguous and clear meaning of the P & I provisions of the policy created a legal obligation on the part of Hartford to indemnify Olin for its expenses in defending the Sun Oil suit. 384 F.Supp. at 250-251. "But even when such rules [relating to ambiguous insurance contracts] are applicable, adoption of any reasonable construction favorable to the Assured is mandatory." *Id.* at 251. We respectfully disagree with the district court's reading of the contested provisions, and with its statement of the rule of construction to be applied in this case.

I

The Hartford policy states that the coverage provided Olin is "in consideration of the payment of the premium for loss or damage which occurs *during the policy period stated in the declarations. . . .*" This part of the policy was omitted when the policy was introduced as an exhibit; it appears however in the complete policy found in the supplemental appendix. The district court asserted in its opinion that the

2. The court found that "the evidence is insufficient to determine whether the impact of the collision between the *S/S Western Sun* and the barge, *if there was such a collision,* caused the barge to split into two sections, or whether the barge split because of the pounding it took in the rough weather and heavy seas". The court also found, in the alleged collision case, "this evidence is conflicting with all the other evidence offered by plaintiffs and defendants. It is unquestionably insufficient to justify the court in finding from a preponderance of the evidence that the plaintiff's vessel actually only struck the bow section of the barge, which had drifted from its original location."

"policy does not require, necessarily, that a loss occur during the policy premium term". *Id.* at 250.

The relevant portion of the P & I policy reads:

> It is agreed that if the Assured, as shipowners, shall have become liable to pay, and shall have in fact paid, any sum or sums in respect of any responsibility, claim demand, damages and/or expenses, or shall become liable for and shall pay any other *loss arising from or occasioned by any of the following matters or things dur-the currency of this policy* in respect of the ship hereby insured, that is to say:
>
> (a) *Loss or damage* in respect of any other ship or boat, or in respect of any goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused approximately or otherwise by the insured vessel, in so far as the same is not covered by the Running Down Clause in or attached to the policies on Hull and Machinery.
>
> (b) *Loss or damage* to any goods merchandise, freight, or other things or interests whatsoever, other than as aforesaid, whether on board said vessel or not.
>
> (c) *Loss of Life or personal injury,* and for payments made on account of life salvage.
>
> (d) *Loss or damage* to any harbor, dock, graving, or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or

property in or on the same.

(e) *Any attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.*

(f) *Liability for loss*, damage or expense incurred in connection with or in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.

(g) *Net loss* due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect to port charges incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation.

This company will, subject to the reservations herein mentioned, pay to the Assured such proportion of the sum or sums so paid, for such loss, as the amount insured by this policy bears to the policy value of the ship hereby insured, and in case the liability of the Assured has been contested, with the consent in writing of two-thirds of the Underwriters on the ship hereby insured in amount, this Company will, subject to the conditions of this policy, also pay a like proportion of the costs which the Assured shall thereby become liable for and shall pay. (Emphasis added.)

The court read this language as providing coverage

upon the occurrence of any of the listed *matters or things*

during the premium term of the policy. The policy does not require, necessarily, that a *loss* occur during the policy premium term. One of the "matters or things" listed in Section (e) is neglect or failure to raise, remove, or destroy the wreck of an insured vessel. Therefore, the policy, as it applies to this item, reads as follows:

> "It is agreed that if the Assured, as shipowners, shall have in fact paid any sum in respect of any expenses arising from or occasioned by any neglect or failure to raise, remove, or destroy the wreck of the vessel during the currency of this policy, this Company will pay to the Assured the sum or sums so paid."

In the prior suit, Sun Oil alleged that there had been neglect in raising or removing the Barge NL-701. At the time of the alleged striking by the S/S WESTERN SUN, the Barge NL-701 had been wrecked approximately three months. Of this period, all but approximately two weeks occurred during the policy's premium term. Clearly, Sun's lawsuit charged neglect during the currency of this policy. Therefore, the policy provided coverage beyond question.

Id. at 250.

The trial judge considered this conclusion bolstered by the distinctive language used in section (e). The six other sections each refer to either "loss", "damage", "injury", or "liability". He stated that, before an obligation to indemnify arises, one of these matters must have occurred during the policy premium term. He felt that because those terms are not used in section (e) only neglect to raise or remove a vessel must have occurred during the policy premium term,

i.e. before January 27, 1969, to establish an obligation to indemnify.

We are unable to share the district court's conviction that the quoted language has an unambiguous meaning. The court, applying strict grammatical rules, asserts that the phrase "during the currency of this policy" must modify the words nearest it, i.e. "matters or things". It is far from conclusive that the time-qualifying phrase "during the currency of this policy" modifies "matters or things". Notwithstanding the terminology used in Sections (a) through (g), the quoted language-makes equally good sense if the time-qualifying phrase modifies the term "loss" in the phrase "any other loss". It can also be argued that the former phrase modifies the objects of the first two verb phrases in the clause, i.e. "sum" or "sums". Moreover the phrase "currency of this policy" is qualified by the opening declaration that the coverage is "in consideration of the payment of the premium for loss or damage which occurs during the policy period stated in the declarations".

[1,2] In our view ambiguity[3] pervades these provisions. In the first instance, it is uncertain which words are modified by the phrase "during the currency of this policy". We do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed

3. The ambiguity we find, however, is in the nature of the second type described in the following passage:

> *ambiguity.* The word as here used includes not only those ambiguities that leave the reader genuinely puzzled which of two interpretations is right, but also those in which one of these, probably the more natural grammatically, is clearly not what the writer meant. The fault of this kind of writing is not so much obscurity as clumsiness.

against the insurer [4] in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers. In substance the authorship of the policy is attributable to both parties alike. *See Canton Ins. Office v. Independent Transportation Co.*, 9 Cir. 1914, 217 F.213. Significantly, the policy in question is not the usual printed form but is what is known as a "manuscript" policy, containing some standard printed clauses but confected especially for Olin. It is true, of course, as the trial judge observed, "scriveners of insurance policies are acutely aware of the meaning and effect of the language." We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts.

The court's interpretation obscures the essential question of what is the "currency" of the policy. In a sense, the currency of a policy refers solely to the period in which premiums are paid. In another sense, the policy has a currency as long as whole or partial coverage is afforded. The district court's reading renders this policy current in this respect for as long as the sunken barge can give rise to losses which must be indemnified. This construction would give the insured perpetual coverage without payment of premiums, an actuarial nightmare, in an insurance situation where the

4. An insurance is usually a "contract of adhesion", where the insured has no bargaining power. Only for this reason, is the policy construed against the insurer. See Judge Frank's discussion of this principle in his dissenting opinion in *Siegelman v. Cunard White Star*, 2 Cir. 1955, 221 F.2d 189, 204.

premiums are recomputed annually. In this perspective, the policy provisions should be construed to give a reasonable meaning that most closely reflects the probable intentions of the parties to the insurance contract. "It is thought, too, that unless the language is so clear and strong as to prevent such a construction, the contract should be interpreted not only so that it may stand, but that it may stand as a reasonably practicable commercial undertaking: that is, of two possible constructions, that which is most reasonable from a business point of view should be taken." 9 *Arnould* Marine Insurance § 105, p. 88 (1961 Ed.)

II

[3] Because the district court found these provisions to be unambiguous, it did not need to consider what law governs this task. Its opinion, nonetheless, indicated that Missouri law controlled any future determinations as to an award for prejudgment interest, or penalties and attorneys' fees for vexatious refusal to pay an insured loss. 384 F. Supp. at 251. This choice of law is also correct in regard to the rules of construction we are to apply. In the absence of specifically controlling federal authority, the law of the state where a marine insurance contract is issued and delivered governs the construction of its language. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 1955, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337; *Irwin v. Eagle Star Ins. Co.*, 5 Cir., 455 F.2d 827, *cert. denied*, 1972, 409 U.S. 852, 93 S.Ct. 118, 34 L.Ed 2d 95.

[4] Of course, in Missouri, as in other jurisdictions, the rule of thumb is that if the meaning of a policy provision is doubtful and the language used is susceptible of different constructions, the one most favorable to the insured is

adopted. *See Baltimore Bank & Trust Co., v. United States Fidelity & G. Co.*, 8 Cir. 1971, 436 F.2d 743, 746; *American Insurance Co. v. First Nat'l Bank in St. Louis*, 8 Cir. 1969, 409 F.2d 1387, 1390; *McMichael v. American Ins. Co.*, 8 Cir. 1965, 351 F.2d 665, 669. Under Missouri law, however, again as in other jurisdictions, this rule should not be employed automatically: "[I]nsurance contracts are to be reasonably construed consonant with the apparent objective and intent of the parties". *Baltimore Bank & T. Co. v. United States Fidelity & G. Co.*, 436 F.2d at 746. *See American Insurance Co. v. First Nat'l Bank in St. Louis*, 409 F.2d at 1390; *Mid-Continent Stores, Inc. v. Central Sur. & Ins. Corp.*, Mo. App. 1964, 377 S.W. 2d 567, 568.

In deciding what a reasonable construction of the contested provisions is, the material we may draw from consists of those provisions, the policy as a whole, and the apparent objectives of the parties in establishing this kind of contractual relationship. This task is not simple. There appears to be no previous judicial construction of similar P & I provisions. And, the cited language is susceptible to more than one meaning.

[5] The reading given by the district court is literally correct -- as far as it goes. When the phrase "any other loss arising from or occasioned by any of the following matters or things during the currency of this policy" is read in conjunction with section (e), the expenses related to the defense of the Sun Oil suit appear to be covered by the policy. The key language is the phrase "arising from" which connotes that only some preliminary event leading to an eventual loss must have occurred during the currency of the policy. On the other hand, the alternative phrase "occasioned by" connotes that there must be actual causation of the

loss during the currency of the policy. Assuming that these phrases are not redundant, the use of the "arising from" language indicates that coverage may exist for losses related to an alleged failure to raise the wreck beginning during the policy premium term but culminating in some kind of damage after that term has expired.

It remains, however, to look to the quoted P & I provisions as a whole to determine whether this reading is consistent with a coherent and contractual agreement. First, it is important to note the structure of this lengthy provision. The term "Assured" operates as the subject of a long clause beginning with the word "if" and ending with section (g). That clause and the four preceding words do not form a coherent sentence. To make sense they must be read with the sentence that follows. The second significant feature of this clause is that it contains parallel sets of double verb phrases. The first set, "shall have become" and "shall have paid", is in the future perfect tense. The second set, "shall become" and "shall pay", is in the future tense. Each of these sets of verbs has a direct object or objects. The objects of the first set are "sum" and "sums" followed by the phrase "in respect of any responsibility, claim demand, damages and/or expenses". The object of the second set of verb groups is "loss". It is, of course, the effect of the phrases that follow that word as modifiers that is disputed.

The essential difficulty we have in accepting the district court's reading of these provisions is that it deprives the remaining portions of the clause of a reasonable meaning. We feel compelled to construe the quoted provisions as a whole in such a manner as to give them a coherent meaning most closely approaching what the parties reasonably intended. Our pursuit of this meaning compels us to reach a construction that does not afford Olin coverage for its costs in defending the Sun Oil suit.

The first aspect of our objection to the district court's reading is that the semiclause consisting of the first set of verb groups, objects, and related modifiers does not give a meaning that the parties could have reasonably intended unless the phrase "during the currency of this policy" is read into it by way of parallel construction. The alternative to this reading is a contractual agreement requiring Hartford to indemnify Olin for any sums it actually has become liable for and has paid as shipowners. There would be no time qualification on this kind of indemnity. Thus, we read this semi-clause as requiring indemnification for certain monetary liabilities incurred and paid during the premium term of the policy.

Assuming that the contested time-qualifying phrase modifies the direct objects in the first semi-clause, it follows that this phrase was intended to have the same usage in the second semi-clause. In that context it modifies "any other loss", thus giving the meaning that coverage extends only to losses occurring during the premium term of the policy. For indemnification purposes, a loss occurs during the policy premium term when an event that gives rise to potential liability and litigation, such as the alleged collision in this case, happens during that term. This construction is supported, however, by more than the stylistic convention of parallel construction.[5] The extension of coverage required

---

5. Parallel ideas should be expressed in parallel structure.

. . . . .

> For the expression of co-ordinate ideas a noun should be paralleled with a noun, an active verb with an active verb, an infinitive with an infinitive, a subordinate clause with a subordinate clause, and so forth.

J. Hodges, Harbrace Handbook of English, 284 (1948).

by the district court's reading runs sharply against the risk calculation principles of insurance. That argument is highly persuasive in the factual context this case presents.[6] If a former insured fails to raise a sunken vessel over an extended period of time after the premium term of a policy has expired, the risk to the insurer is incalculable. Although Hartford's risk in retrospect was bounded by the abandonment and sale of the sunken barge, there was no guarantee that Olin would take these steps. Olin in fact argues that the coverage found by the district court related to a neglect to raise or remove the barge beginning during the policy premium term and that this coverage should continue indefinitely without further payment of premiums.

Our conclusion is undisturbed by the trial judge's suggestion that such coverage is reasonable because the major portion of any negligence in failing to remove the barge took place during the premium term, i.e. before January 27, 1969. The obligation to indemnify under this policy does not depend on contingent circumstances such as chronological proximity to the date the policy was terminated. Coverage is either grounded upon the intentions of the parties as expressed in the language of the policy, or, if ambiguities are present in the language, upon a reasonable construction of its terms. Because there is no reasonable construction of the P & I provisions which affords coverage

6. Hartford concedes that it has found no authority holding directly that an insurer may not be bound to cover a risk indefinitely. It contends, however, that "for an insurance policy to be valid it must contain an agreement as to the period of duration of the risk assumed". 12 Appleman, Insurance Law and Practice §7176, p. 172 (Supp. 1974). We do not need to consider the merits of this proposition since our decision rests on a construction of what the parties reasonably intended by the use of the particular policy language in this case. We hold that that language does not encompass indefinite P & I coverage for expenses related to a failure to remove vessels which have sunk during the policy premium term. In other circumstances indefinite coverage without continued premium payments might be the result of unambiguous contractual language. It might result as well from a judicial construction of ambiguous policy language holding that the parties reasonably intended such coverage in view of the policy taken as a whole and relevant circumstances such as the feasibility of risk calculations.

to Olin for its defense of the Sun Oil suit, we are unable to construe the doubtful policy language in favor of the insured. The judgment of the district court must therefore be reversed.

As a final note, we observe that the equities in this case do not appear in favor a decision for either party. Olin's efforts to remove the barge under the "sue and labor" provisions of the policy unquestionably enure to the benefit of Hartford by minimizing Hull losses through salvage. But this circumstance does not necessarily entail a windfall from Olin's salvage operations. In the first instance, Hartford's coverage was in effect during a substantial portion of the time recovery efforts were actually conducted. Its consideration for that coverage was the premium. Since Olin's actual losses in 1968 apparently exceeded its projected losses by a large amount, it may be assumed that Olin received reasonably priced insurance through the policy termination date. Moreover, since the barge was not successfully removed, the potential savings to the insurer from the salvage operations were sharply limited.

On another point, Olin's contention that a finding of non-coverage leaves it effectively uninsured under the P & I provisions in instances of potentially enormous third party liability due to the five day policy termination provision has limited merit. In the event of a marine disaster similar

to the *Wychem* 112 incident which involved a toxic chemical, *see Wyandotte Transportation Co. v. United States*, 1967, 389 U.S. 191,88 S.Ct. 379, 19 L.Ed. 2d 407, the insured party might indeed find itself exposed to potentially enormous liability. This argument, however, ignores two salient factors. First, Olin, like many other fleet owners or bareboat charterers, has a large "umbrella" liability policy which provides coverage for losses and liabilities not otherwise provided for in its P & I policies. This umbrella insurance is the major protection against catastrophic loss.[7] The second factor is that the five day policy termination provision may be exercised unilaterally by either the insured or the insurer. This provision is the product of bargaining between large corporate entities and is advantageous to the insured or the insurer depending on contingent circumstances such as fleet losses and competitors' insurance rates. These factors support the argument that lack of coverage is at least not unjust.

The district court's statement that an owner could not be expected to continue to insure a sunken vessel is also unpersuasive. As long as the sunken barge could give rise to significant liability, Olin could reasonably be expected to maintain insurance on it. The sunken vessel in this case constitutes only a small portion of the insurable risk related to the appellees' fleet. And, as pointed out, Olin is protected under an umbrella liability policy with another insurer, except for the operation of a $100,000 deductible. In this perspective, there is no discernible hardship worked on any of the parties to this suit by a finding of coverage or non-coverage.

The judgment of the district court is REVERSED.

---

7. The liability of the umbrella underwriters is subject to a $100,000 deductible. Here the costs and expenses are substantially less than $100,000.

APPENDIX B

COURT OF APPEALS DENIAL OF REHEARING

UNITED STATES COURT OF APPEALS

Fifth Circuit

Edward W. Wadsworth
Clerk

Office of the Clerk
January 19, 1977

Tel 504 - 589-6514
600 Camp St.
New Orleans,
Louisiana 70130

TO ALL COUNSEL OF RECORD

NO. 74-3858 - Eagle Leasing Corporation, ET AL., v. Hartford Fire Ins. Co. v. National Casualty Co., Etc., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

BY: S/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Brunswick G. Deutsch
Mr. George A. Frilot, III

APPENDIX C

OPINION OF DISTRICT COURT IN EAGLE LEASING CORPORATION, ET AL v. THE HARTFORD FIRE INSURANCE COMPANY

EAGLE LEASING CORPORATION, et al.
v.
The HARTFORD FIRE INSURANCE COMPANY,

Civ. A. No. 7279

United States District Court, E.D. Texas,
Beaumont Division.

Sept. 21, 1974

Earl S. Hines, Brown & Hines, Beaumont, Tex., Donald A. Hoffman, George A. Frilot, III, Lemle, Kelleher, Kohlmeyer, Matthews & Schumacher, New Orleans, La., for plaintiffs.

H. Barton Williams, Deutsch, Kerrigan & Stiles, New Orleans, La., Leslie M. Ball, Wendell C. Radford, Benckenstein, McNicholas, Ball, Oxford & Radford, Beaumont, Tex. for Defendant.

MEMORANDUM OPINION

JOE J. FISHER, Chief Justice.

This is a suit on a contract of insurance. The assured has sued the insurer to recover the costs of successfully defending an earlier action in this court. The insurer resists on the basis that the policy in question expired prior to the event

complained of in the prior action against the assured. The Court has concluded that the policy provided continuing coverage against the type of liability asserted in the prior action, and, therefore, the assured is entitled to recoup its costs of defense.

This case was tried to the Court on the basis of agreed stipulations of fact and briefs of counsel. While the Court took full cognizance of all of the stipulated facts, the following are the essential elements upon which the Court relied in reaching its judgment:

A fleet policy of marine insurance, No. 84 OM A18900, was issued and delivered in St. Louis, Missouri, to the plaintiffs, Eagle Leasing Corporation, Olin Corporation (formerly Olin Mathieson Chemical Corporation), and Nilo Barge Line, Inc., through the Lawton-Byrne-Bruner Insurance Agency Co. of St. Louis, Missouri, for a period beginning at noon, January 1, 1967, and extending for a period of three years, subject to the payment of annual renewal premiums. The coverage provided by the policy was set forth as follows: Section I -- Hull and Machinery; Section II -- Protection and Indemnity including Excess Protection and Indemnity; Section III -- Cargo; Section IV -- Charterer's Legal Liability. By endorsement dated January 10, 1968, the policy term was extended until January 1, 1971, and the policy was amended so that the sole subscribing underwriter was The Hartford Fire Insurance Company. The first annual premium for the vessels covered under the policy amounted to $251,016.58. All premium charges due The Hartford were timely paid.

In December, 1968, The Hartford, through the Lawton-Byrne-Bruner Agency, quoted to the plaintiffs an annual renewal premium price of $583,000.00. Plaintiffs declined

to accept this quotation, and by January 27, 1969, obtained insurance with companies other than The Hartford.

On November 16, 1968, Barge NL-701, one of the vessels covered by the policy, sank in the Gulf of Mexico. Nilo Barge Line, Inc. immediately commenced search and salvage operations in an effort to raise and remove the sunken barge from the bottom of the Gulf. Such operations, interrupted only by adverse weather, were underway approximately four months until March 17, 1969, at which time further efforts were deemed to be economically inadvisable, and the sunken wreck was abandoned and sold.

On February 10, 1971, Sun Oil Company brought Civil Action No. 7082 on the docket of this Court, wherein Sun claimed that its tanker, the S/S WESTERN SUN, struck the sunken Barge NL-701 on February 14, 1969, resulting in damages in the amount of $389,781.91. Liability was asserted against Nilo, et al., on the basis of negligent failure to promptly remove the sunken wreck. The case came on for trial before the Court on June 12, 1972 through June 15, 1972. This Court found in favor of Nilo, et al., and denied any recovery by Sun. Judgment to that effect was entered on January 29, 1973.

At the outset of the litigation by Sun against Nilo, et al., the Assureds made appropriate requests of The Hartford to protect, defend or indemnify in accordance with the policy. The Hartford refused, its position being that the duty, to protect and indemnify the plaintiffs existed only during the "currency" of the policy, which was claimed to have terminated on January 27, 1969. The controversy thus presented for the Court's determination centers on the question as to whether The Hartford's Protection and Indemnity policy (Section II) provided coverage because the policy was

in effect when the barge sank, even though the premium term of the policy expired prior to the alleged striking of the wreck by the S/S WESTERN SUN.

The most significant element of this case is the provision of the Protection and Indemnity policy which affords coverage. It provides:

> "It is agreed that if the Assured, as shipowners, shall have become liable to pay, and shall have in fact paid, any sum or sums in respect of any responsibility, claim demand, damages and/or expenses, or shall become liable for and shall pay any other *loss arising from or occasioned by any of the following matters or things during the currency of this policy* in respect of the ship hereby insured, that is to say:
>
> (a) *Loss or damage* in respect of any other ship or boat, or in respect of any goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused approximately or otherwise by the insured vessel, in so far as the same is not covered by the Running Down Clause in or attached to the policies on Hull and Machinery.
>
> (b) *Loss or damage* to any goods, merchandise, freight, or other things or interests whatsoever, other than as aforesaid, whether on board said vessel or not.
>
> (c) *Loss of life or personal injury*, and for payments made on account of life salvage.
>
> (d) *Loss or damage* to any harbor, dock, graving, or otherwise, slipway, way, gridiron, pontoon, pier,

> quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or property in or on the same.
>
> (e) *Any attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.*
>
> (f) *Liability for loss*, damage, or expense incurred in connection with or in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.
>
> (g) *Net loss* due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect to port charges incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation."
>
> "This Company will . . . pay . . . the costs which the assured shall thereby become liable for and shall pay." (Emphasis supplied)

As the Court appreciates the quoted language, the policy provides coverage upon the occurrence of any of the listed *matters or things* during the premium term of the policy. The policy does not require, necessarily, that a *loss* occur during the policy premium term.[1] One of the "matters or

---

1. The Court discerns that the adjective-prepositional phrase "during the currency of this policy" relates to "matters or things" and not to "loss." Rudiments of English grammar require that modifiers be placed nearest the word modified. Fowler, Modern English Usage (2nd ed., "Ambiguity,"¶ 21). Hodges and Whitten, Harbrace College

things" listed in Section (e) is neglect or failure to raise, remove, or destroy the wreck of an insured vessel. Therefore, the policy, as it applies to this item, reads as follows:

> "It is agreed that if the Assured, as shipowners, shall have in fact paid any sum in respect of any expenses arising from or occasioned by any neglect or failure to raise, remove, or destroy the wreck of the vessel during the currency of this policy, this Company will pay to the Assured the sum or sums so paid."

[1] In the prior suit, Sun Oil alleged that there had been neglect in raising or removing the Barge NL-701. At the time of the alleged striking by the S/S WESTERN SUN, the Barge NL-701 had been wrecked approximately three months. Of this period, all but approximately two weeks occurred during the policy's premium term. Clearly, Sun's lawsuit charged neglect during the currency of this policy. Therefore, the policy provided coverage beyond question.

[2] Reference to the other "matters or things" listed in Sections (a), (b), (c), (d), (f), and (g), only strengthens this conclusion. Each item refers to either "loss," "damage," "injury," or "liability." With respect to these, loss, damage, injury, or liability must have occurred during the policy

---

Handbook (5th ed., p. 278); Strunk and White, The Elements of Style (12th printing, 1965, p. 24); Walsh, Plain English Handbook (rev. ed., 1959§ 435-A).

The Court is satisfied that the aforementioned basic guidelines for construction of an English sentence were well in mind when this policy was drafted; and if there had been an intention to require that a loss occur within the premium term, the policy would have read:

". . . any other loss during the currency of this policy arising from or occasioned by any of the following matters or things, etc."

premium term. However, as stated above, subsection (e) requires only that "neglect" occur during the policy premium term. The Court therefore finds and concludes that the intent of the parties was that the policy would provide continuing coverage with respect to claims arising from or occasioned by failure or neglect in raising, removing, or destroying a wreck of an insured vessel during the policy's premium term.

Insofar as equities are concerned, the Court has no doubt but that the decision announced herein is manifestly fair. Commencing immediately following the sinking of Barge NL-701 and continuing until March 17, 1969, Nilo performed "sue and labor" within the meaning of the Hull policy (Section I). Such search, salvage and removal efforts were directed toward minimizing losses occasioned by the sinking. Any savings achieved would have inured to the benefit of The Hartford, as Hull underwriter. Therefore, assuming the correctness of the Court's decision here, The Hartford stood to gain by removal of the wreck on two separate bases: (a) minimizing losses through salvage, and (b) elimination of potential liability for injury to persons or vessels resulting from collisions with the sunken wreck. To permit The Hartford to reap the benefits of salvage or wreck removal while avoiding coverage for liability arising out of or occasioned by such efforts would be inequitable. Moreover, one could not reasonably expect a vessel owner to continue to purchase insurance on a sunken wreck. Clearly, the Court's decision here represents a just balancing of the equities.

[3,4] Each case involving a question of insurance coverage must be examined in the light of the specific insuring agreement. Resort to rules of construction is unnecessary

when the contract itself is unambiguous and its meaning clear (as the Court has concluded is the case with this policy). 43 Am. Jur. 2d Insurance §259 (1969). But even when such rules are applicable, adoption of any reasonable construction favorable to the Assured is mandatory. 43 Am. Jur. 2d Insurance §271 (1969). This rule is applicable particularly in the case of a time policy of marine insurance. Allen N. Spooner & Sons, Inc. v. Connecticut Fire Insurance Company, 314 F.2d 753, 755 (2d Cir., 1963).

Beyond these general rules, specific judicial precedent has been in the main unhelpful to the Court in deciding this case. The Court has not found or been cited to prior decisions involving substantially identical policy provisions and circumstances.

For the foregoing reasons, an interlocutory judgment will be entered in favor of the plaintiffs and against the defendant for the full amount of the costs, expenses and attorneys' fees incurred in defense of the suit by Sun Oil Company. If within a period of sixty days from the entry of this judgment the parties cannot agree as to the amount of the expenses and attorneys' fees reasonably incurred by the plaintiffs, the Court shall set this case for hearing with respect to those matters only. The Court defers making any determinations with respect to prejudgment interest, or penalties and attorneys' fees as provided under Missouri law for vexatious refusal to pay an insured loss until such time as the parties make a report to the Court.

APPENDIX D

AGREED STIPULATIONS OF FACT SUBMITTED BY EAGLE LEASING CORPORATION, OLIN CORPORATION, NILO BARGE LINE, INC. AND HARTFORD FIRE INSURANCE COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

EAGLE LEASING CORPORATION, OLIN CORPORATION and NILO BARGE LINE, INC. — CIVIL ACTION

versus

HARTFORD FIRE INSURANCE COMPANY — NO. 7279

AGREED STIPULATIONS OF FACT SUBMITTED BY EAGLE LEASING CORPORATION, OLIN CORPORATION, NILO BARGE LINE, INC. AND HARTFORD FIRE INSURANCE COMPANY

1.

A policy of marine insurance was issued and delivered in St. Louis, Missouri to plaintiffs, Eagle Leasing Corporation, Olin Corporation (formerly Olin Mathieson Chemical Corporation), and Nilo Barge Line, Inc., being policy No. 84 OM A18900, issued through the Lawton-Byrne-Bruner Insurance Agency Company of St. Louis, Missouri, for a period beginning January 1, 1967 at noon EST and extending for a period of three years. The policy was underwritten by the

Hartford Fire Insurance Company (65%) and Underwriters at Lloyd's and London Companies (35%). The coverage provided by the policy was set forth as follows: Section I - Hull and Machinery; Section II - Protection and Indemnity including Excess Protection and Indemnity; Section III - Cargo; Section IV - Charterer's Legal Liability. The first annual premium for the vessels covered under the policy, including Barge NL-701, amounted to $251,016.58. A copy of the policy is identified as "Plaintiffs' Exhibit - A."

2.

By endorsement dated January 10, 1968, the policy term was extended to expire January 1, 1971 at noon EST, and the policy was amended so that the sole subscribing underwriter was the Hartford Fire Insurance Company - 100%.

In Section II of the policy - Protection and Indemnity including Excess Protection and Indemnity - there was a provision which read as follows:

> "It is agreed that if the Assured, as shipowners, shall have become liable to pay, and shall have in fact paid, any sum or sums in respect of any responsibility, claim, demand, damages and/or expenses, or shall become liable for and shall pay *any other loss arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the ship hereby insured*, there is to say:-
>
> (a) *Loss or damage in respect of any other ship or boat*, or in respect of any goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused *proximately or otherwise by the insured vessel, in so far as the same is not covered by the Running Down Clause in or attached to the policies on Hull and Machinery.*

> (b) Loss or damage to any goods, merchandise freight, or other things or interests whatsoever, other than as aforesaid, whether on board said vessel or not.
>
> (c) Loss of life or personal injury, and for payments made on account of life salvage.
>
> (d) Loss or damage to any harbor, dock, graving, or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or property in or on the same.
>
> (e) *Any attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.*
>
> (f) Liability for loss, damage, or expense incurred in connection with or in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.

(g) Net loss due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect to port charges incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation."

4.

The limits of Protection and Indemnity Insurance covering Barge NL-701 were in the primary amount of $665,000.00.

5.

All premium charges due the Hartford Fire Insurance Company by plaintiffs in connection with policy No. 84 OM A18900 have been timely paid.

6.

On or about November 16, 1968, Barge NL-701 sank in the Gulf of Mexico. Immediately following the sinking of said barge, Nilo Barge Line, Inc. commenced search and salvage operations in an effort to raise and remove the sunken barge from the bottom of the Gulf. Continuous search and removal operations, interrupted only by adverse weather, were underway from November 16, 1968 until March 17, 1969, at which time further efforts were deemed to be economically inadvisable and the sunken wreck of the barge was abandoned and sold as hereinafter set forth.

7.

Following the sinking of Barge NL-701 in November 1968, a claim was timely presented to Hartford Fire Insur-

ance Company for the loss of the barge and for the amounts expended for sue and labor in the attempts to salvage the sunken barge. The Hartford Fire Insurance Company denied the claim and litigation followed which was ultimately compromised prior to the commencement of the trial in the United States District Court at St. Louis, Missouri.

8.

In connection with the attempts to salvage sunken Barge NL-701, the Hartford Fire Insurance Company agreed that United States Salvage Association might be utilized to observe and supervise the salvage of the barge. The agreement was confirmed by letter addressed to the Lawton-Byrne-Bruner Insurance Agency Company by Fay A. Peck, Claims Supervisor, under date of November 26, 1968, a copy of which is identified as "Plaintiffs' Exhibit-B".

9.

Policy No. 84 OM A18900 provided that at "....each anniversary date the loss ratio for the past year under consideration shall be calculated on the basis of premiums earned is (sic) to paid and reserved losses. The resulting loss ratio shall determine the premiums and/or rates applicable to the succeeding year..."

10.

In December 1968, Hartford Fire Insurance Company quoted an annual renewal premium price to plaintiffs through Lawton-Byrne-Bruner Insurance Agency Company, viz., the sum of $583,000.00. Plaintiffs declined to accept

this renewal premium quotation.

11.

On December 26, 1968, plaintiffs, through Lawton-Byrne Bruner Insurance Agency Company, informed Hartford of its election not to renew its insurance coverages with Hartford and Hartford Fire Insurance Company granted an extension of coverage for a period of fifteen days in order to permit plaintiffs to replace coverages for the calendar year 1969.

12.

On January 1, 1969, plaintiffs, through Lawton-Byrne-Bruner Insurance Agency Company succeeded in placing 50% of the coverage provided by Policy No. 84 OM A18900 with the Continental Insurance Companies, Marine Office of America-Appleton and Cox Marine Division, and at the same time Hartford Fire Insurance Company granted a further extension with respect to the remaining coverage under the said policy in order to allow Nilo to complete replacing the coverage. Sunken Barge NL-701 was not referred to in the schedule of vessels in the policies issued by the Continental Insurance Companies.

13.

On January 13, 1969, plaintiffs obtained through the Lawton-Byrne-Bruner Insurance Agency Company a commitment for a renewal binder of 100% of the coverage furnished under Policy No. 84 OM A18900, except that the Hull and P & I deductibles were increased to $5,000.00. The renewal was placed with the Continental Insurance

Companies, Marine Office of America-Appleton and Cox Marine Division. The annual premium for the renewal was $432,334.00. A copy of the letter notifying plaintiffs of the aforesaid coverage is identified as "Plaintiffs' Exhibit-C".

14.

The schedule of vessels in the commitment for the renewal binder described in the preceding Paragraph No. 13 did not refer to sunken Barge NL-701, as indicated by the communication delivered to Mr. Peter Reeves of the Lawton-Byrne-Bruner Insurance Agency Company, identified as "Plaintiffs' Exhibit-D", and policies of insurance which have been exhibited to opposing counsel but which are not attached as exhibits.

15.

On January 27, 1969, plaintiffs obtained, through Lawton-Byrne-Bruner Insurance Agency Company, a confirmation binding coverage in the Continental Insurance Company subject to the same conditions as on Policy No. 84 OM A18900 of the Hartford Fire Insurance Company, except that the Hull and P & I deductibles were increased to $5,000.00, all as evidenced by the letter from Marine Office of America, Western Department, S. L. Bodman, Resident Vice President, dated January 27, 1969, identified as "Plaintiffs' Exhibit-E".

16.

In early February 1969, the attempts to raise and salvage sunken Barge NL-701 progressed to the point at which it appeared the barge might be refloated. In point of fact, the

bow of Barge NL-701 was raised to the surface on February 13, 1969, but the stern remained embedded in the mud bottom of the Gulf of Mexico. On February 14, 1969, the bow of the barge again sank to the bottom of the Gulf as a result of heavy weather. Plaintiffs made arrangements through Lawton-Byrne-Bruner Insurance Agency Company to insure Barge NL-701 under coverages which would attach as soon as the vessel was raised and approved by U. S. Salvage Association for a voyage to a nearby shipyard. A copy of the confirmation of the binder dated February 14,1969 is identified as "Plaintiffs' Exhibit-F".

17.

On March 13, 1969, following interruption of salvage operations because of bad weather, it was discovered that the bow section of sunken Barge NL-701 had broken free of the barge and could not be located.

18.

On March 16, 1969, a telegram was directed to the U. S. Coast Guard and the U. S. Corps of Engineers advising that sunken Barge NL-701 had been abandoned, the stern section being located in approximately 65 feet of water at 29° 59.05' North, 93° 45' West in the Gulf of Mexico and the bow section missing.

19.

On March 17, 1969, counsel for Nilo Barge Line, Inc. directed correspondence to H. E. Martini, Secretary of The Hartford Insurance Group, advising of the status of the situation and stating:

> ". . . . I certainly wanted to advise you of these developments inasmuch as the Hartford, as P & I underwriter insures the potential exposure of Nilo to any third parties who may be damaged by the wreck. Accordingly, if you have any comments or observations with respect to the action we have taken, please communicate directly with me."

A copy of the aforesaid communication is identified as "Plaintiffs' Exhibit-G".

20.

On March 21, 1969, H. E. Martini, Secretary of The Hartford Insurance Group, directed correspondence to counsel for Nilo Barge Line, Inc. which stated in part:

> "Confirming our March 17, 1969, conversation and responding to yours of March 21, 1969, on behalf of underwriters, we must respectfully reject the abandonment of Barge NL-701 and the expenses connected therewith.
>
> "We doubt the front of the barge will ever be found and while we might have to respond to any of Nilo's liability as a result of negligence, we doubt that Nilo will be required to do more than you have already done to protect their interests.
>
> ". . . .You [Mr. Frilot] assured me that our conversations and communications were without prejudice in any way to the rights of any of the parties."

A copy of the aforesaid communication is identified as "Plaintiffs' Exhibit-H".

21.

On March 22, 1969, the bow section of Barge NL-701 was located a distance of approximately 2-1/2 miles from the location where the stern of the barge was embedded in the bottom of the Gulf of Mexico. The precise location of the bow section was at Loran fix 3H2/3463, 3H3/3662. The foregoing information was transmitted to the U. S. Corps of Engineers and the U. S. Coast Guard along with a confirmation of the abandonment of the barge.

22.

On April 3, 1969, counsel for Nilo Barge Line, Inc. again reported to H. E. Martini, Secretary of The Hartford Insurance Group, concerning the costs and advisability of removal or demolition of the wreck of the sunken barge. The report read in part as follows:

> "On the basis of the information available to Nilo at this time, Nilo has reached a decision to take no further action with respect to the sunken NL-701. I want to confirm that the Hartford concurs in this decision and is not interested in taking any additional action for its own account. As you know, I am particularly concerned in keeping you advised of all of these developments because of the provision in the P & I policy which insures Nilo's liability with respect to '(A)ny attempted or actual raising, removal or destruction of the wreck of the insured vessel or the cargo

> thereof, or any neglect or failure to raise, remove or destroy the same.
>
> "The final point I want to bring to your attention is that Acadia Marine, Inc. of Crowley, Louisiana, in the person of a Mr. Collins, has contacted Nilo and indicated an interest in salvaging the barge, destroying the wreck by demolition and/or purchasing the sunken wreck from Nilo. I know nothing of Acadia Marine, Inc. or Mr. Collins, but I have suggested that Nilo pursue further discussions with Mr. Collins particularly with respect to the third area of inquiry. I will, of course, keep you advised if there are any developments."

A copy of the aforesaid report is identified as "Plaintiffs' Exhibit-I".

23.

Appropriate notices were published in newspapers and periodicals having circulation in the Coastal States bordering the Gulf of Mexico setting forth the fact that plaintiffs had abandoned any interest in Barge NL-701 and setting forth the location of the two sections of the barge.

24.

On May 1, 1969, the two sections of the sunken wreck of Barge NL-701 were sold by Nilo Barge Line, Inc., Olin Corporation and Eagle Leasing Corporation to Gene V. Collins for the price and sum of $100.00. A copy of the Bill of Sale is identified as "Plaintiffs' Exhibit-J".

25.

On May 15, 1969, the U. S. Coast Guard was advised that all interest of Nilo Barge Line, Inc., Olin Corporation and Eagle Leasing Corporation in and to barge NL-701 had been sold to Gene V. Collins.

26.

There was absolutely no notice to plaintiffs or to Hartford Fire Insurance Company of any claim that the S/S WESTERN SUN allegedly struck sunken Barge NL-701 in the Gulf of Mexico on February 14, 1969 until plaintiffs were served with a suit filed in this Court on behalf of Sun Oil Company and against plaintiffs, being the matter entitled "Sun Oil Company vs. The United States of America and Nilo Barge Line, Inc. and Eagle Leasing Corporation and Olin Corporation", Civil Action 7082. The aforesaid suit was filed on February 10, 1971. The damages claimed in said suit, as amended, amounted to $389,781.91 plus interest and costs.

27.

Following service of process of the aforementioned complaint filed on behalf of Sun Oil Company, plaintiffs notified their Protection and Indemnity insurer, Hartford Fire Insurance Company, of the suit pending against them and demanded defense and indemnification in accordance with the provisions of the policy. The Hartford Fire Insurance Company refused to protect, defend or indemnify plaintiffs, its position being that under the terms of Hartford's policy its duty to protect and indemnify plaintiffs existed only during the "currency" of the policy. (See Hartford Exhibit

No. 4).

28.

Plaintiffs employed the law firm of Lemle, Kelleher, Kohlmeyer & Matthews of New Orleans, Louisiana, and George W. Brown, Jr. of Beaumont, Texas, to handle the investigation and defense of the suit filed against them. Following extensive investigation and pre-trial discovery, the case proceeded to trial in this Court on June 12, 1972 and concluded on June 15, 1972, after which a transcript of the testimony of all witnesses was prepared and post-trial briefs submitted to the Court. Thereafter the Court entered its findings of fact and conclusions of law and a judgment dismissing all claims against plaintiffs.

Respectfully submitted,

LEMLE, KELLEHER, KOHLMEYER & MATTHEWS

s/ George A. Frilot,III
GEORGE A. FRILOT,III

Of Counsel

s/ Donald A. Hoffman
DONALD A. HOFFMAN
1800 First National Bank of Commerce Building
New Orleans, Louisiana 70112
Telephone: 586-1241

s/ Earl Hines
EARL HINES
395 - Tenth Street at Broadway
Beaumont, Texas, 77702

Attorneys for Plaintiffs

BENCKENSTEIN, McNICHOLAS,
BALL, OXFORD & RADFORD

Of Counsel

s/ Leslie M. Ball
LESLIE M. BALL
605 San Jacinto
Building
Beaumont, Texas

DEUTSCH, KERRIGAN
& STILES

Of Counsel

s/ H. Barton Williams
H. BARTON WILLIAMS
One Shell Square -
47th Floor
New Orleans, Louisiana
70139

Attorneys for Defendant
Hartford Fire Insurance
Company

EXHIBIT A

The voluminous manuscript policy has not been reproduced but the SP-14 form, which contains all of the insuring clauses, appears on the following page.

(March 1943) SP 14

PROTECTION AND INDEMNITY CLAUSES INLAND VESSELS

It is agreed that if the Assured, as shipowners, shall have become liable to pay, and shall have in fact paid, any sum or sums in respect of any responsibility, claim demand, damages and/or expenses, or shall become liable for and shall pay any other loss arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the ship hereby insured, that is to say:-

(a) Loss or damage in respect of any other ship or boat, or in respect of any goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused approximately or otherwise by the insured vessel, in so far as the same is not covered by the Running Down Clause in or attached to the policies on Hull and Machinery.

(b) Loss or damage to any goods, merchandise, freight, or other things or interests whatsoever, other than as aforesaid, whether on board said vessel or not.

(c) Loss of life or personal injury, and for payments made on account of life salvage.

(d) Loss or damage to any harbor, dock, graving or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or property in or on the same.

(e) Any attempted or actual raising removal or destruction of the wreck of the insured vessel or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.

(f) Liability for loss, damage, or expense incurred in connection with or in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.

(g) Net loss due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect of port charges incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation.

This company will, subject to the reservations herein mentioned, pay to the Assured such proportion of the sum or sums so paid, for such loss, as the amount insured by this policy bears to the policy value of the ship hereby insured, and in case the liability of the Assured has been contested, with the consent in writing of two-thirds of the Underwriters on the ship hereby insured in amount, this Company will, subject to the conditions of this policy, also pay a like proportion of the costs which the Assured shall thereby become liable for and shall pay.

NOTWITHSTANDING THE FOREGOING, NO LIABILITY TO ATTACH TO THIS COMPANY:

(1) For any loss, damage or expense in connection with any accident covered under the Four-fourths Running Down Clause, or

(2) For the first $ ——— of claims hereunder arising from one accident or occurrence.

(3) For any loss, damage or claim arising out of or having relation to the towage of any other ship or vessel, whether under agreement or not, but this clause shall not apply to ordinary salvage services, not contracted for, rendered in an emergency to a ship or vessel in distress, nor to damage to fixed objects nor to loss of life or personal injury.

(4) For any claim or loss resulting from the value of the ship insured being fixed or assessed for purposes of General Average, Salvage or Collision Liability, at an amount exceeding its insured value named in the policy on hull and machinery, etc.

(5) For short delivery and/or contamination of cargo however caused.

(6) For any obligation for which the Assured may be held liable under any Workmen's Compensation Law of any State or Nation or under the Federal Longshoremen's and Harbor Workers' Compensation Act.

AND PROVIDED FURTHER THAT:

Liability hereunder shall in no event exceed that which would be imposed on the Assured by law in the absence of Contract.

Liability hereunder shall be limited to such as would exist if the Charter Party, Dray Receipt or Contract of Carriage contained a clause that exempts the Assured and the vessel named in this policy from liability for losses arising from unseaworthiness, even though existing at the beginning of the voyage, provided, that due diligence shall have been exercised to make the vessel seaworthy and properly manned, equipped and supplied, and a Jason clause,

and a clause giving the carrier the benefit of the limitations of and exemptions from liability contained in Section 3 of the Harter Act.

If and when the Assured under this policy has any interest other than as shipowner in the vessel or vessels named herein, in no event shall this Company be liable hereunder to any greater extent than if such Assured were the owner and were entitled to all the rights of limitations to which the shipowner is entitled.

NAVIGATION PRIVILEGES: Warranted confined to the use and navigation of the _____

Warranted that when any matter arises likely to lead to a claim it shall be promptly referred to this Company's own representatives, legal or otherwise, for investigation and attention, unless otherwise specially agreed.

No accident or event likely to lead to a claim will be admitted by this Company unless notice in writing be given within thirty (30) days after the Assured shall have knowledge thereof.

The vessel is deemed to be covered under Full Form Insurance on hull and machinery, etc., with no uninsured interest and with the Four-fourths Running Down Clause attached thereto, and this cover shall not protect the Assured from the risks or expenses usually covered by such policy nor under any circumstances against loss of or damage sustained by the insured vessel or her tackle, apparel, furniture, stores, fittings, equipments, freight, coals, provisions, or appurtenances, nor against loss by cancellation of charters, bad debts, insolvency of agents or others, sal-

vage, detention or demurrage of the insured vessel, nor for loss of or damage to the Assured's own cargo. This cover shall in no case operate as a double insurance.

This Company shall be subrogated to all the rights which the Assured may have against any other person or entity, in respect of any claim or payment made under this policy, to the extent of such payment and the Assured shall, upon the request of this Company, execute all documents necessary to secure to this Company such rights.

This Company shall be entitled to take credit for any profit accruing to the Assured by reason of any negligence or wrongful act of the Assured's servants or agents, up to the measure of their loss, or to recover for their own account from third parties any damage that may be provable by reason of such negligence or wrongful act.

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by this Company, under this policy, there shall be no contribution by this Company on the basis of double insurance or otherwise.

No action shall lie against this Company for the recovery of any loss sustained by the Assured unless such action is brought against this Company within one year after the final judgment or decree is entered in the litigation against the Assured, or in case the claim against this Company accrues without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim.

Liability hereunder in respect of any one accident or occurrence is limited to the amount declared and insured.

Losses shall be payable within sixty days after proof of loss or damage covered by this policy, and of the amount thereof, and of the interest of the Assured shall have been made and presented at the office of this Company, the amount of premium on this policy, if unpaid, and all other indebtedness due this Company being first deducted.

This policy shall be canceled at any time at the request of the Assured; or by this Company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is canceled by this Company by giving notice they shall retain only the pro rate premium. Notice of cancellation mailed to the address of the Assured stated in the policy shall be sufficient notice; the check of this Company, or its agent which similarly mailed shall be a sufficient tender of any unearned premium.

It is agreed that there shall be no return of premium if interest insured be lost by perils not insured against hereunder.

Attached to and forming part of Policy No._____of

_____

Dated_____, 19__.

For Sale by Joseph Lazard, 11 John Street, New York, N.Y. 10038

Printed in U.S.A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1458

EAGLE LEASING CORPORATION, OLIN CORPORATION and NILO BARGE LINE, INC.,
Petitioners,

versus

HARTFORD FIRE INSURANCE COMPANY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

New Orleans, Louisiana
May 18, 1977

Brunswick G. Deutsch
Overton T. Harrington, Jr.
Of Counsel

Malcolm W. Monroe
of
Deutsch, Kerrigan & Stiles
4700 One Shell Square
New Orleans, La. 70139
Counsel for Respondent

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1458

EAGLE LEASING CORPORATION, OLIN CORPORATION and NILO BARGE LINE, INC.,
Petitioners,

versus

HARTFORD FIRE INSURANCE COMPANY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. BECAUSE OF ITS RESTRICTED NATURE, THE APPELLATE COURT'S DECISION NEITHER WARRANTS NOR MERITS REVIEW

This case is not appropriate for review by this Court, because the Court of Appeals expressly rejected the invitations of both petitioners and respondent to make sweeping statements about wreck coverage under marine policies, which would have affected, in petitioners' words, "the entire marine industry". Petition, p. 6. Refusing to go to the lengths urged by either party, the Court of Appeals' decision is best summarized by the following language, rejecting

respondent's assertion that a general rule of insurance law governed the situation:

> "Hartford concedes that it has found no authority holding directly that an insurer may not be bound to cover a risk indefinitely. It contends, however, that for an insurance policy to be valid it must contain an agreement as to the period of duration of the risk assumed. . . . We do not need to consider the merits of this proposition since our decision rests on a construction of what the parties reasonably intended by the use of the particular policy language in this case. We hold that that language does not encompass indefinite P & I coverage for expenses related to a failure to remove vessels which have sunk during the policy premium term. In other circumstances indefinite coverage without continued premium payments might be the result of unambiguous contractual language. It might result as well from a judicial construction of ambiguous policy language holding that the parties reasonably intended such coverage in view of the policy taken as a whole and relevant circumstances such as the feasibility of risk calculations". A-14, A-15, fn. 6.

The decision below may be persuasive authority in certain cases (and perhaps controlling in a few), but it gives no long-range comfort to insurers nor does it necessarily bode ill for insureds.[1]

---

1 Form SP-14 was utilized in this case as part of a "manuscript policy" especially confected for a large corporation, as noted by the Court of Appeals. A-9. Differing policy terms, situations, and equities are left open by the Court of Appeals for future determination.

Petitioners would lead this Court to believe they are prompted to apply for review, in part, because of concern for "many, family-owned small boat companies". Petition, pp. 7-8. It is to be wondered whether such small family enterprises wish their fate determined by a general ruling on the subject as presented by their new-found corporate friends. Smaller enterprises have their own situations, their own equities not available to petitioners, and perhaps factual situations and printed (as opposed to manuscript) policies which, by virtue of the ruling below, may entitle them to a far more favorable decision.

Review would be appropriate for the purpose of making a ruling affecting "the entire marine industry", but it would properly come before this Court in a case in which an appellate court did purport to state a general principle applicable to every marine policy and wreck situation. The Court below disavowed any such intention. A-14 and A-15, fn. 6.

Petitioners pose a series of questions indirectly alluding to the "ticking time bomb" situation presented by *Wyandotte Transportation Co. vs. United States*, 389 US 191 (1967) (Petition, pp. 6-7), and try to make capital out of the most extreme of cases. Based upon that horrifying spectre, they in effect ask this Court to rule that a vessel wrecked during the currency of a policy is perpetually covered by the insurer, no matter what the terms of the policy may be. A policy clearly restricting coverage only for the policy period would be impermissible, and presumably insurers providing protection and indemnity coverage

in the future would effectively be told that it is impossible to limit wreck coverage in any fashion.[2]

The Court of Appeals' decision provides a better answer. Insurance questions presented by a *Wyandotte* calamity would be answered by reference to the type of policy; its terms; whether printed or manuscript policies were involved, whether the policy is clear or ambiguous on the question, whether the matter involved "family-owned small boat companies" (Petition, pp. 7-8) or sophisticated corporations (A-9), and what, under the policy terms, may have been the reasonable intent and expectations of the parties.

In sum, there are innumerable variations on a central theme, but petitioner would have this Court, in Draconian fashion, make a rule for "the entire marine industry".

A second ground militating against review is the nature of the proceedings below. At issue was a contract of insurance and the rights of the parties were determined by reference to rules of interpretation and construction governing contracts in general, not on maritime principles. The district court and the Court of Appeals both recognized that the policy at issue was an insurance policy, like any other insurance policy, and the disputed provisions were approached and

2 It is a matter of logic that premiums for wreck coverage would undoubtedly be adjusted to reflect such exposure. An extreme situation such as *Wyandotte*, above, should not be employed to deprive both insurers and insureds of freedom of contract in tailoring policies to the needs of the particular insureds. Barge owners carrying grain cargoes have insurance which reflects their situation, while barge owners carrying chlorine cargoes have other insurance fitted to their own situation.

determined by standards applicable to all contracts of insurance.[3]

The Court of Appeals carefully dissected and compared the relevant portions of the form, resorting to rules of grammatical construction, matters of logic, and the desire to interpret the phrase "during the currency of this policy" in a reasonable fashion. The Court concluded: "The essential difficulty we have in accepting the district court's reasoning is that it deprives the remaining portions of the clause of a *reasonable meaning*." A-12 (emphasis supplied).

Although reversed by the Court of Appeals as to his interpretation, the district judge took the same approach. "Each case involving a question of insurance must be examined in light of the specific insuring agreement." A-25. The district judge then resorted to rules of grammatical construction in reaching his decision.

Maritime aspects of the case below were referred to by the district court (A-25) and the Court of Appeals (A-15) only for the purpose of determining whether any special "equities" existed between the parties in this particular situation.

3 The Court of Appeals further stated that it was applying the law of Missouri governing principles of construction of contracts. A-10, A-11. At the worst, the Court of Appeals could be charged with nothing more than having misconstrued the law of Missouri in this case. This raises a serious question whether this Court should entertain jurisdiction over this matter, under Rule 19(b) of the Supreme Court Rules, 28 USC §19(b). Improper application of the laws of a particular state in interpreting a contract does not appear to be grounds for certiorari review.

Taking petitioners' cause at its best, but without conceding its correctness, the district judge properly interpreted the contract, while the Court of Appeals was incorrect in its interpretation. This does not merit review, however. Owners of wrecks are not a special breed apart from other insureds. Their rights are no better than other insureds. They may elect not to insure their vessels and cargoes at all; but, if they do, their protection will be determined by their particular contract of insurance, and this may vary from policy to policy, situation to situation.

Other contentions of petitioners deserve only brief comments. Petitioners' advocacy in certain respects could be answered, but the answers in turn would involve assertions of fact.

For example, has form SP-14, on its face dated March, 1943, been almost universally replaced by Form SP-23, thus rendering any interpretation of SP-14 of little interest to the entire marine industry? If the answer were in the affirmative, it would make review even less appropriate. Whether wreck insurance can be obtained could also be answered.

The hypothetical question posed by petitioners concerning an insurer which, when confronted with a *Wyandotte* situation, suddenly attempted to give a five-day notice under SP-14, to avoid further exposure, is easily answered. No insurer would dare to contemplate such an action; no competent counsel would advise the insurer to do so. The decision of the Court of Appeals in this case, relative to the "probable intentions" of the parties in contracting (A-10), would be authority against the insurer.

II. THE COURT OF APPEALS DID NOT TAKE "JUDICIAL NOTICE", BUT DREW REASONABLE INFERENCES FROM THE RECORD

Petitioners' arguments as to "judicial notice" simply do not merit review.

The question is not even one of judicial notice. The unanimous Court of Appeals simply utilized the record before it to ascertain that, in applying recognized rules of construction to a manuscript policy, it was not dealing with an "innocent", but with a corporation on equal bargaining terms with its insurers. There is ample evidence in the record to justify this conclusion, and to charge the Court of Appeals with abuse of discretion merely weakens petitioner's first point.[4]

The manuscript policy, printed *in toto* in the appendix utilized by the Court of Appeals, is itself sufficient to defeat petitioner's argument. The policy runs 121 pages in the appendix; contains numerous special endorsements affecting, at times, as many as fifty vessels; and, it is fair to say, is as detailed and carefully tailored a policy as can be found. It makes reference to financing agreements; names, as loss payees, many banks, insurance companies, corporate

4 It is unseemly for petitioners to accuse the Court of Appeals of "going far beyond the bounds of propriety" (A-9), when they themselves see fit to testify: "The record does not so reflect, but we here state that no one from Nilo, Olin or Eagle Leasing participated in the procurement of the policy much less the drafting of the policy". A-9. It can be concluded that petitioners have no objection to citing matters outside the record, as long as those matters favor petitioners' cause.

subsidiaries, corporate affiliates, charterers, and subcharterers; and on and on. If anything, the proper concept may not be one of reasonable inference, but one of *res ipsa loquitur*.

If, in fact, Nilo Barge Line, Olin Corporation and Eagle Leasing did not bother to play any part in the drafting or confection of this policy, did not have their insurance departments review it, did not consult competent counsel, then perhaps the Court of Appeals was too kind in terming them "sophisticated" corporations. A-9. Perhaps these businessmen are rightly entitled to be termed "unsophisticated", incompetent or indifferent. Such businessmen are not entitled, thereby, to invoke the presumptions which run in favor of an ordinary policyholder who, in fact, cannot understand many portions of his insurance policy and must take it in its printed form as offered.

Innumerable other documents in the record entitle the Court of Appeals to have drawn the conclusions it did. The Court was correct in its application of the standards of *Canton Ins. Office vs. Independent Transportation Co.*, 217 F. 213 (CA 9, 1914), and assuredly its discretion was not abused.

CONCLUSION

This matter is nothing more than a dispute about certain provisions of an insurance policy and does not have the wide ramifications petitioners assert. When compared with cases involving matters of national and constitutional importance which daily appear on

this Court's docket, it is particularly inappropriate for review and the petition should be denied.

Respectfully submitted,

Malcolm W. Monroe

New Orleans, Louisiana
May 18, 1977

CERTIFICATE OF SERVICE

I, Malcolm W. Monroe, one of the attorneys for respondent in the above-entitled proceeding, being a member of the bar of the Supreme Court of the United States, do hereby certify that, on the 18th day of May, 1977, I served copies of the Opposition to Petition for Writ of Certiorari, by mailing same, properly addressed and postage prepaid, to George A. Frilot, III of Messrs. Lemle, Kelleher, Kohlmeyer & Matthews, 1800 National Bank of Commerce Building, New Orleans, Louisiana 70112, counsel for petitioners.

Malcolm W. Monroe